FILE COPY

In the

Supreme Court of the United States

OCTOBER TERM, 1959

No. 38

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Petitioner,

v.

MARY L. DONNELLY HENAGAN,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Questions Presented

1. Does the petition make any substantial showing that the evidence was insufficient?

2. Does the petition make any substantial showing that the Motion for New Trial was erroneously disposed of?

Statement

Petitioner's statement omits the relevant matter summarized below.

The engineer Crafts testified that he did not see the deceased woman (Mrs. Montell) step off the platform be-

is apparent that the jury in this case disregarded the law as given by your Honor.

The Court: I cannot say that. I can only say that if this were a case in which a verdict was permissible for the plaintiff, then I don't think they disregarded my instructions. I am going to indicate very shortly what my views are, and I am going to help you get to the Supreme Court, but I am not going to help you much here.

Mr. Deering: Well, then perhaps in view of that there is no need for me to continue further.

* * *

Argument

I. There Is No Substantial Question as to the Sufficiency of the Evidence.

This case is a strange compound of tragedy and geometry. One woman, Montell, is killed on the track. The other, Henagan, is physically injured by the violent stopping of the train, and caused, in the sequel, to believe that she is responsible for Montell's death. Here is a poor engineer, says the railroad, caught between these unbalanced females. What was he to do, it asks, when a madwoman threw herself in front of his train when he was but 40 feet away?

Nothing of the sort happened. Mrs. Montell did not plunge in front of the train—she *walked*. She *walked* on the track for 11 seconds at least before she was hit, and during 9 of those seconds she could have been seen by the engineer.

The basic geometry we shall discuss is established by Ex. 1A (DRA 107), a scale-plan of the track and platform. We have reproduced the relevant part of that exhibit in

Appendix A of this brief taking care to preserve its scale. With that before us, we ask, as the jury did: *How far was Montell from the engineer when she stepped off the platform?* The railroad says the situation was thus:



FIG. 1

This ignores vital evidence: *the engineer himself testified that he did not see M step off the platform because his view was blocked by a baggage-truck and an ice-truck on the platform.* (DRA 14, 17-18, 28-29). The true geometry is not that of Figure 1. It is the following:



FIG. 2

Here B represents the baggage- and ice-trucks, and the dotted-line is the interrupted line of vision of E. An elementary law of optics, perceived and applied by the jury, tells us that MBE is a straight line. An equally elementary law of geometry shows that the distance ME must exceed the distance MB.

A small experiment performed on Appendix A (or Ex. 1A) will demonstrate that the distance ME must far exceed 40 feet. 40 feet on Ex. 1A is two inches. Take a foot-rule and place the zero end of it *anywhere* on the line marking the edge of the platform (M's position). Place the two-inch mark on the right-hand rail (E's position). Clearly there will be no obstacle on the platform between 0 and 2. There will indeed be no platform between 0 and 2!

The jury had evidence before it from which it could locate M and B on Ex. 1A. First, as to M: the witness Brewster testified that he arrived on the platform via the stairway in the east kiosk shown on Ex. 1A; that he proceeded east to the fifth post and waited for the train; that Mrs. Montell engaged him in conversation and then moved to his left "about 20 feet or so". (DRA 107-109; Brewster marked the fifth post on Ex. 1A, DRA 109). We submit that the jury could find that M left the platform between the fifth and sixth posts at the point we have indicated on Appendix A of this brief.

The engineer himself testified that the baggage- and ice-trucks which blocked his view were at ". . . the east end of the station . . . before you get to that canopy . . ." (DRA 30). Examining Ex. 2A, a photograph which looks east (DRA 10), he said the trucks were "just the other side of this crossing here" (DRA 42). We submit that the jury could find that they were anywhere between the east crossing shown on Ex. 1A and the east end of the canopy. We have, on Appendix A, located them at the spot most favorable to the railroad: just to the east of the crossing at the edge of the platform.

Having located M and B on Ex. 1A the jury could draw a straight line through them and prolong it till it intersected the right hand-rail (Appendix A). It could find that E was at this intersection when M stepped off the platform. It could measure ME and find it to be 11 inches or 220 feet. *The jury could properly conclude that when M stepped off the platform, E was 220 feet, or 11 seconds away,* his speed being 13-15 miles per hour (DRA 12):



FIG. 3

So far E has not seen M. *When could he first have seen her?* Obviously when he drew abreast of the obstacle on the platform:

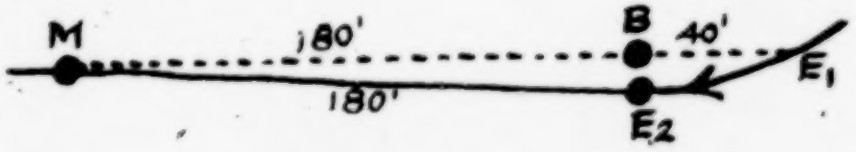


FIG. 4

(Approximately 2 seconds elapse between Figure 3 and Figure 4.) *The jury could properly find that when E got to the east crossing* (Ex. 1A; Appendix A) *he had a clear view of M on the track, and that M was then 180 feet or 9 seconds away.*

Clearly M was on the track for some 11 seconds before she was struck. No one says she plunged or jumped in front of the train. On the contrary: "she stepped out slowly" (Bowen, DRA 113), "she walked toward the farther rail" (Meegan, DRA 117; Dupere, DRA 110). One witness says she went to the fence (Nelson, DRA 115), before she turned back and kneeled, or squatted, or fell in front of the engine. For 9 seconds E saw or should have seen these movements, which indicate an obvious suicide, or perhaps merely a bewildered woman approaching a fence in which, *to E's knowledge*, there was no opening (Crafts, DRA 34).

E took no action whatsoever until 8 of the 9 seconds elapsed. He then woke and brought the train to a sudden and violent stop. This would clearly take the case to the jury even in an action by a passenger at Common Law.

Dorr v. *Lehigh Valley R.R. Co.*, 211 N.Y. 369, 373-374. The present case involves liability, not to a seated passenger, but to an employee whose duty as a waitress required her to stand. She was thus, to the knowledge of the rail-

road, peculiarly vulnerable in case of a sudden stop. Furthermore, had there been a partial application of the brakes preceding the final stop, she would have been warned of the danger, as the jury could find from testimony of her fellow-employee, Driscoll.

> "Q. Have you become aware as a general matter when a train stops in your experience—do you become aware of that stopping in some way? A. Well, only through vibration, feeling the air going on the train for brakes; you feel a sudden vibration which you are quite used to, even approaching every stop you feel a certain vibration. You're acclimated to that.
>
> * * *
>
> "Q. Generally, when brakes are applied when the train comes to a stop, are you made aware of it through some kind of vibration? A. Yes.
>
> "Q. Which occurs before the train finally comes to a stop? A. Yes." (Driscoll, DRA 56.)

Here there was no warning whatsoever:

> "Q. Now did anything of that kind happen in this particular case on October 11, 1954? A. No. No, it was a sudden stop.
>
> * * *
>
> "The Court: Just a moment. You are being asked there was no vibration before this train came to a stop. "The Witness: No. None that I remember of, your Honor. Just a sudden stop. Period." (Driscoll, DRA 56-57.)

The verdict in this case was based upon geometry and mensuration not upon passion or sympathy. It is respectfully submitted that there is no substantial question as

to the sufficiency of the evidence. Petitioner's question No. 2 (Pet. p. 2) asks this Court to parse and construe an opinion of the Court of Appeals which is based on a false and partial view of the evidence. The writ ought not to issue for grammatical reasons. In the circumstances its issuance would be a great injustice to the respondent Henagan.

II. No Substantial Question Is Raised by the Disposition of the Railroad's Motion for New Trial.

Petitioner argues (Pet. p. 7) that the trial court denied the motion for new trial as a matter of law and not in the exercise of its discretion. If the record consisted solely of the written notation made by the trial judge on the motion (DRA p. 133), the conclusion perhaps would follow. But the judge himself plainly indicated that he wished "... to be a little more explicit than I am in these endorsements." (DRA 133.) We submit that the entire transcript of January 13, 1959, must be considered in order to determine what the trial judge did.

At the start of the hearing of January 13, 1959, defendant's counsel cited and discussed *Herdman* v. *Pennsylvania R.R. Co.*, 352 U.S. 518 (PRA 33.) That case, he urged, decided that it could not be negligence "for an engineer of a train to make a sudden stop when met with an emergency." (PRA 34.) To this the Court remarked:

> "You ignore what was argued to the jury by Mr. Kelleher. It was not without a straw of evidence to support it. His argument was that the engineer should have seen earlier." (PRA 34.)

In making this remark, we submit that the trial judge passed upon and denied grounds 1 and 2 assigned in the motion for new trial. Those grounds are as follows:

"1. That the verdict is contrary to the evidence and against the weight of the evidence;

"2. That the verdict is against the law applicable to the evidence . . ." (DRA 132.)

That conclusion, we submit, is re-inforced by the next succeeding remark of the court made after an interjection by Mr. Deering:

"The Court: You persuaded the thirteenth juror, but not the twelve." (PRA 35.)

Then follows on page 36 of the Transcript of January 13, 1959 (PRA 35) the following:

"Mr. Deering: I think that is practically all I care to say in regard to the Motion for a Directed Verdict.

"The Court: This is a perfect case which I would be very happy to see how nine men treat. I would love to have you successful in getting to the Supreme Court of the United States, and I am not going to block you from getting there.

"Mr. Deering: Well, I would also like to address a few remarks to the Motion for a New Trial. I think that in view of your Honor's indicated position on the Motion for Directed Verdict that *it is all the stronger case for a Motion for a New Trial because I think it is apparent that the jury in this case disregarded the law* as given by your Honor.

"The Court: *I cannot say that.* I can only say that if this were a case in which a verdict was permissible for the plaintiff, then *I don't think they disregarded my instructions.* I am going to indicate very shortly what my views are, and I am going to help you get to the Supreme Court, *but I am not going to help you much here.* (italics supplied.)

Here, we submit, the judge again ruled that he did not regard the verdict as being against the law as given by him to the jury in his instructions, and again denied the first and second grounds assigned in the motion for new trial. He further indicated definitely that he would not grant that motion. At that point, we respectfully submit, Mr. Deering acquiesced, and ceased to press the motion for new trial on any ground, for he then said to the court:

> "Well, then, perhaps in view of that there is no need for me to continue further." (PRA 35.)

All this occurred before the trial judge read the endorsement on the motion. (DR. 133.) That endorsement, therefore, in no way relates to the motion for new trial but only to the motion for judgment notwithstanding the verdict.

If we are wrong in what we have just said and if the trial court did deny the motion as a matter of law this clearly was an error of law arising after judgment and not involved in any way in the judgment of January 8, 1959. It has long been established by decisions of this court that an order entered after judgment, denying a motion for a new trial as a matter of law, is an order which is itself appealable. In *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, 482-483, 53 S.Ct. 252, 255, 77 L.Ed. 439, this court, speaking through Mr. Justice Brandeis, held as follows:

> "Under certain circumstances the appellate court may inquire into the action of the trial court on a motion for a new trial. Thus, its denial may be reviewed if the trial court erroneously excluded from consideration matters which were appropriate to a decision on the motion, *Mattox* v. *United States*, 146

U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917; *Ogden* v. *United States*, 3 Cir., 112 F. 523; *or if it acted on the mistaken view that there was no jurisdiction to grant it*, or that there was no authority to grant it on the ground advanced, *Felton* v. *Spiro*, 6 Cir., 78 F. 576, 581; *Dwyer* v. *United States*, 9 Cir., 170 F. 160, 165; *Paine* v. *St. Paul Union Stockyards Co.*, 8 Cir., 35 F.2d 624, 626-628." (italics supplied.)

If, as petitioner argues, the order of January 13, 1959, denied the motion for a new trial as a *matter of law* it follows that the order was in itself appealable and that it was a "judgment" within the definition of Rule 54(a) of the Federal Rules of Civil Procedure (Pet., App. A, p. 19). There were thus, if petitioner is correct in this part of his argument, two "judgments" in this case, one entered on January 8, 1959, and the other entered on January 13, 1959. Only the second "judgment" is affected by the alleged error of law of which petitioner now complains. He has appealed only from the first "judgment" (DRA 135). It is submitted that petitioner's question No. 1 (Pet. p. 2) presents no substantial question for the consideration of this court.

Conclusion

For the reasons above set forth it is respectfully submitted that the petition for certiorari presents no substantial question for the consideration of the Court despite the suggestion of the trial court (PRA 35) that this is a "perfect case" for its consideration. We suggest that the result arrived at by the jury is so plainly correct that it would be a gross injustice to respondent to prolong this litigation any further.

Respectfully submitted.

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15



Eastern stairway.

Location of witness Brewster at 5th post east of stairway. (Brewster DRA 107 -108).

KIOSK

POST

Location of Mrs. Montell as she left platform, per witness Brewster. (DRA 107 - 109).



vster
vay.
).

Position of baggage and ice-trucks per testimony of engineer Crafts (DRA 38, 39). These obscured his view of Mrs. Montell as she stepped from platform. (Crafts, DRA 17, 28 - 29.)

T. SHELTER

GATE

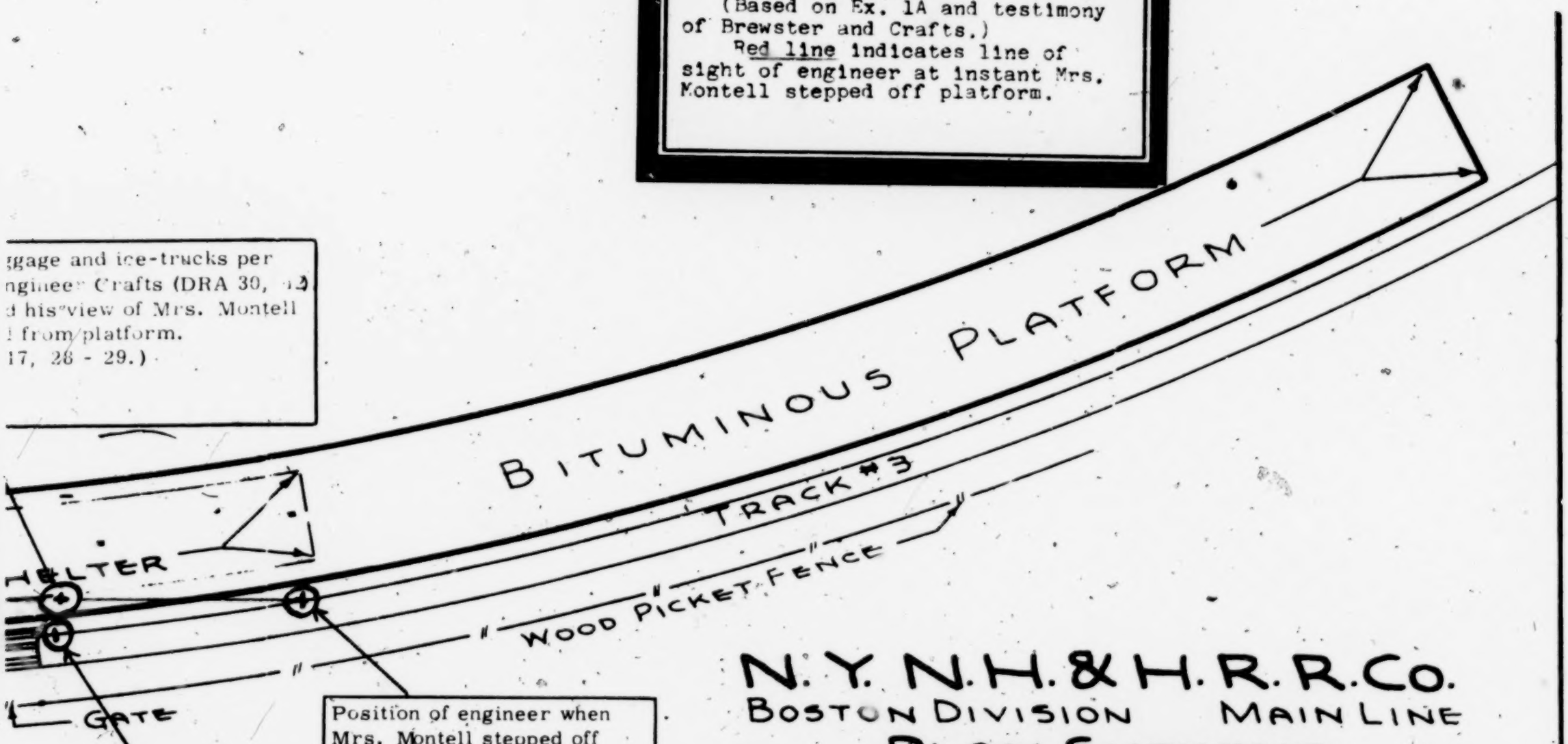
rs. Montell as
rm, per witness
RA 107 - 109).

When engineer reached this point he had clear view of Mrs Montell on the track 130 feet away.

Position of e
Mrs. Montel
platform.

APPENDIX A
(Based on Ex. 1A and testimony of Brewster and Crafts.)
Red line indicates line of sight of engineer at instant Mrs. Montell stepped off platform.

ggage and ice-trucks per
ngineer Crafts (DRA 30, 31)
d his view of Mrs. Montell
l from platform.
17, 28 - 29.)



engineer reached this
e had clear view of Mrs
l on the track 180 feet

Position of engineer when Mrs. Montell stepped off platform.

N.Y. N.H. & H.R.R.Co.
BOSTON DIVISION MAIN LINE
PLAN SHOWING
PORTION OF TRACK #3 & PLATFORM
UNION STATION
PROVIDENCE, RHODE ISLAND
SCALE 1" = 20'

SURVEYED BY AEF BMS PHTO